

78-2253

IN THE  
SUPREME COURT OF THE UNITED STATES

.....Term, 1979

Number .....

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SUPREME COURT, U.S.

FRANCIS RICK FERRI,  
Petitioner

- VS -

DOMINICK ROSSETTI, ESQUIRE,  
Respondant

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA  
FOR THE COMMONWEALTH OF PENNSYLVANIA

By,

Francis Rick Ferri  
P.O. Box 1000  
Lewisburg, Pa. 17837

Petitioner Pro se

JURISDICTIONAL STATEMENT

(a) This is an appeal from the Opinion & Order of the Pennsylvania Supreme Court, Appendix pages 1 thru 9, by a divided Court affirming the lower Court's order dismissing petitioner's tort claim against his former assigned counsel.

(b) The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257 (3). Appeals from state courts for writ of certiorari.

(i) The proceeding below centered upon petitioner's tort claim, under state law, seeking redress for injuries inflicted upon him by respondent, after the attorney-client period of representation has terminated.

(ii) The Order of the Pennsylvania Supreme Court was entered on January 24, 1979, and has not been published as of this date. The sister case in this matter (now pending certiorari before this Court in Docket Number 78-5981) appealed from the Opinion & Order of the Pennsylvania Supreme Court in Ferri v Ackerman, \_\_\_\_\_ Pa. \_\_\_\_\_, 394 A. 2d 553 (1978).

The basis for denial in the instant matter rested on the Ferri v Ackerman, supra, Opinion & Order.

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QUESTION PRESENTED FOR REVIEW

Whether a lawyer appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, to represent the petitioner in a Grand Jury investigation is immune from tort liability at the suit of his former client: for the admitted loss of that client's files one year after the attorney-client relationship had terminated?

STATEMENT OF THE CASE

On January 21, 1974, attorney Dominick Rossetti, respondent, was appointed by the U.S.D.C. for W. Pa., under the Criminal Justice Act (CJA), 18 U.S.C. 3006A, to represent the petitioner in a Grand Jury investigation, which pertained, in part, to an investigation for which the petitioner was then under federal arrest.

In the course of that appointment federal prosecutors discussed with the respondent at times, the petitioner at times, and with both (Ferri & Rossetti) at times certain benefits that petitioner was to receive in exchange for the subject matter of those meetings, which reached a climax on February 5, 1974, when a three-way meeting occurred at the Allegheny County Jail, whereby federal prosecutors gave the petitioner written assurances outlining the benefits the petitioner then received.

The written assurances were left in the care and custody of the respondent, who assembled a file in behalf of the petitioner, detailing the dates, the subject matter, and a synopsis of each communication that occurred between the three parties.

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On March 6, 1974, petitioner was released from the Grand Jury investigation, without testimony, and the legal representation of the petitioner by the respondent under the CJA terminated.

On August 28, 1974, petitioner was indicted in federal court contrary, in his belief, to the written assurances he had received from the federal prosecutors, at the February 5, 1974, three-way meeting. Petitioner then filed a motion to dismiss the federal indictment and subpoenaed the respondent, including the file containing the written assurances, to testify in his behalf.

At the hearing on petitioner's motion to dismiss, on January 29, 1975, the respondent testified that certain meetings and communications between himself, federal prosecutors and the petitioner, including the three-way meeting of February 4, 1974, occurred, however, he was unable to locate the memorandums of the meetings, that the matter was rather vague in his mind and absent the files which he could not locate he could not be specific as to precisely what all had transpired.

Petitioner was convicted by a jury of the charges in that federal indictment and incurred a 30 year sentence on April 17, 1975.

On September 7, 1976, petitioner filed a tort complaint in the Court Of Common Pleas, Allegheny County, Pa., charging the respondent with gross negligence for the inexcusable failure to protect the petitioner's property which was entrusted to him.

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Without timely notice the Court of Common Pleas held an ex parte hearing and dismissed the complaint on the grounds that the respondent was absolutely immune from tort liability. The Superior Court of Pennsylvania affirmed and on June 16, 1978, the Pennsylvania Supreme Court granted certiorari, at Number 99 March Term 1978. At the same time the Pa. Supreme Court granted certiorari in the sister case, Ferri v Ackerman, Pa. \_\_\_\_\_, 394 A. 2d 553(1978), which is now pending certiorari before this Court in Number 78-5981.

On January 24, 1979, the Supreme Court of Pennsylvania, by a divided court (three affirming two dissenting and two judges not participating) affirmed the dismissal of petitioner's tort complaint against his former assigned counsel, holding that counsel assigned under the Criminal Justice Act was absolutely immune for the tort complained of, appendix pages 1 thru 9.

#### REASONS FOR GRANTING THE WRIT

1. Petitioner believes an important question of constitutional law is at issue here: whether an attorney, assigned or retained, is liable for the loss of his client's files entrusted to him, after the attorney-client relationship has terminated.
2. Petitioner believes the decision of the Supreme Court of Pennsylvania is in direct contradistinction with recent decisions of this Court pertaining to the immunity doctrine, Imbler v Pachtman, 424 U.S. 409 (1976); Butz v Economou, 47 U.S.L.W. 4961 (1978) and Wood v Strickland, 420 U.S. 308 (1975), and contrary to this Court's decision in Lynch v Household Finance Co., 405 U.S. 538 (1972) pertaining to personal property rights.

#### ARGUMENT

It is the petitioner's position that: he should have been permitted to pursue his complaint, the decision of the Supreme Court of Penna. has stretched beyond what is necessary the outer limits of the doctrine of immunity to participants in judicial proceedings and those participants after the judicial proceedings have ceased; the tort complained of here was of constitutional nature not protected by the immunity doctrine.

1. The complaint was premised solely upon the admitted gross negligence (possible malfeasance) of the respondent, an attorney, to provide adequate safeguards for the protection of the petitioner's property, the files, over which the respondent exercised complete control.
2. The complaint was directed solely at the administrative functions of the respondent, where at best, only a qualified immunity attaches since no exercise of discretion is associated with the administrative activities in question here, Imbler, Butz, Wood, supra.
3. The admitted tort was committed one year after the attorney-client relationship under the C.J.A. had terminated

therefore the liability that attaches began at that moment,  
Fort Meyers Seafood Packers, Inc. v Stepoe and Johnson, 381  
F. 2d 261 (D.C. Cir. 1967) stripping the respondent of any  
protections, if any existed, under the Criminal Justice Act,  
and precluding any defense of immunity since no judicial pro-  
ceedings in which the respondent was a party to were in effect,  
Imbler, Butz, supra, Stump v Sparkman, L. Ed 2d (1978).

4. The deprivation of petitioner's personal property  
constituted a constitutional tort, Lynch v Household Finance  
Co., supra, thus immunity is not to be extended to the consti-  
tutional tort context absent the most compelling justification,  
Briggs v Goodwin, 569 F. 2d 1 (D.C. Cir. 1978), which are non-  
existent in the instant matter.

5. Here the respondent seeks to hide behind the immunity  
afforded his profession as a whole in judicial proceedings, how-  
ever the inquiry here challenges not the identity or the title  
of the officer responsible, rather the misconduct of the partic-  
ular officer beyond the protections needed to sustain an adeq-  
uate flow of lawyers in judicial proceedings noted here.

6. To deny petitioner a remedy for the admitted tort in-  
flicted here, while clients with retained counsel would enjoy  
a host of remedies, violates the Fourteenth Amendment, among  
other Constitutional and Statutory rights enjoyed by the peti-  
tioner.

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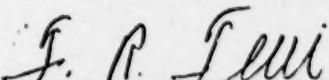
CONCLUSION

It is respectfully prayed that a writ of certiorari be  
granted to review and decide the constitutional question  
presented here; and,

that this petition for writ of certiorari be consolidated  
with the sister case presently before this Court pending a  
writ of certiorari in Ferri v Ackerman, No. 78-5981, since  
both petitions encompass the same issues, and

that this Court appoint the pro se petitioner here, counsel  
who will be permitted to file a consolidated brief encompassing  
both petitions.

Respectfully submitted,

  
Francis Rick Ferri  
P.O. Box 1000  
Lewisburg, Pa. 17837

Petitioner pro se

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Supreme Court, U. S.

FILED

MAR 5 1979

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 78-6153

FRANCIS RICK FERRI,

*Petitioner,*

vs.

DOMINICK ROSETTI,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

HERMAN C. KIMPEL

DICKIE, McCAMEY

& CHILCOTE

*Attorneys for Respondent*

3180 U. S. Steel Building

Pittsburgh, PA 15219

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EDWARD W. SHANNON, SENIOR REPRESENTATIVE  
HAROLD L. BERKOBEN, REPRESENTATIVE  
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(412) 881-7455

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### BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

#### Statement of the Case

On January 21, 1974, Attorney Dominick Rosetti, respondent, was appointed by the United States District Court for the Western District of Pennsylvania, under the Criminal Justice Act, 18 USCA § 3006a, to represent Francis Rick Ferri, petitioner, in a Grand Jury investigation. The Grand Jury investigation had nothing to do with the charges for which the petitioner was ultimately convicted. There were a number of telephone conversations between the respondent and the Federal Strike Force regarding Mr. Ferri's possible cooperation with the Grand Jury. On one occasion, the respondent met with the Strike Force attorneys and Mr. Ferri in the Allegheny County Jail. Mr. Ferri's condition for

cooperation was immunity in a case which was then being investigated. Ultimately, the Federal investigators found that they did not need Mr. Ferri's cooperation, and immunity was never granted. The respondent was eventually tried and convicted, and is presently serving a sentence at the United States Penitentiary at Lewisburg, Pennsylvania. He was never called before the Grand Jury.

Subsequently, the petitioner was indicted and convicted in the District Court, arising out of the bombing of a Mr. Dunn's automobile in 1971. In a pretrial motion, the respondent appeared as a witness for the petitioner and was attempting to aid petitioner in his motion. Interestingly, subsequent to his conviction, the petitioner has brought a malpractice suit against the attorney, Mr. Ackerman, representing him in the bombing case.

The subject matter of the Grand Jury investigation for which the Strike Force was eliciting the petitioner cooperation dealt with the arson trial of persons accused of setting fire to the Bedford Hotel. When the petitioner received notice to appear before the Grand Jury, the Bedford Hotel case was then in progress in Federal Court, and the Federal prosecutors were attempting to gain the cooperation of the petitioner. This prompted the telephone calls and the meeting at the County Jail. Ultimately, the Federal prosecutors found that they did not need the petitioner's help to gain a conviction, and thus no immunity was ever granted.

The gravamen of the petitioner's complaint against his former attorney is that the Government attorneys had given written assurances of immunity and that these written assurances were contained in a file of the respondent, which the respondent supposedly lost. The allegation of negligence is for the loss of petitioner's file, supposedly assuring him of immunity from Federal prosecution.

## **REASONS FOR DENYING THE WRIT**

According to Rule 19(1)(a) of the Supreme Court Rules the grant of a writ of certiorari to review a matter decided in a state court system may only proceed where jurisdiction has been properly invoked. Rule 19(1)(a) indicates that a petitioner seeking such review must make a showing that the state court had either decided a federal question of substance that had not theretofore been resolved by the Supreme Court, or had decided it in a way probably not in accord with applicable decisions of the Supreme Court.

Respondents submit that the Supreme Court of Pennsylvania decided the question at issue consistent with federal case law and in a manner which comports with recent pronouncements of this Honorable Court.

### **I. The disposition of the petitioner's case in the courts of the State of Pennsylvania was in accord with federal case law conferring absolute immunity to criminal defense attorneys made available to indigent clients by court order.**

Recent federal decisional law has consistently denied relief to indigent criminal defendants who, as plaintiffs in malpractice actions, seek to recover money damages from private attorneys earlier appointed to represent them pursuant to the Criminal Justice Act. These decisions are premised upon a uniform application of the rule requiring that attorneys, appointed by the federal courts under the authority of the Justice Act, be accorded absolute immunity from litigation instituted by their clients.

In *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966), a federal prisoner sued a judge, an FBI agent, and his own court-

appointed attorney. In specifically holding that a court-appointed lawyer in a federal criminal case is immune from civil liability, the court first determined that a court-appointed attorney takes on the status of a judicial officer when acting in his court-appointed role. The *Jones* court further reasoned that as a judicial officer, the attorney must be cloaked with judicial immunity. *See also Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976).

In the Third Circuit, immunity has been extended to state public defenders, and to attorneys being sued under civil rights statutes: the former in *Brown v. Joseph*, 463 F.2d 1046 (3rd Cir. 1972), *cert. den.* 412 U.S. 950 (1973), and the later in *Waits v. McGowan*, 516 F.2d 203 (3rd Cir. 1975). In its well-reasoned opinion, the *Brown* court specifically held that: "a County Public Defender created under the Pennsylvania statute, enjoys immunity from liability."

Similarly, the Fifth, Ninth, and Seventh Circuits have recently granted absolute immunity from civil suit to the court-appointed attorneys of indigent criminal defendants. *See Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971); *O'Brien v. Colbath*, 465 F.2d 358, 359 (5th Cir. 1972); *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977). The Seventh Circuit at one time granted a "qualified immunity" to the court-appointed counsel of indigent criminal defendants, but now holds that such counsel are entitled to absolute immunity from suit initiated by their clients, *Caruth v. Geddes*, 443 F.Supp. 1295 (N.D. Ill. 1978); *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir., 1978).

## **II. The decision of the Supreme Court of Pennsylvania is in full accord with public policy and applicable decisions of this Court.**

The number of court-appointed attorneys has grown rapidly since this Honorable Court first ruled that indigent criminal defendants were entitled to the benefit of legal representation at public expense, *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is in the public interest that capable attorneys be encouraged to take on indigent clients at a non-negotiable fee with a maximum limit. If such court-appointed defense counsel were not granted immunity from tort liability arising out of their services to indigent clients, many would refrain from defending indigent clients and the criminal justice system would be significantly impaired.

Furthermore, it would be manifestly unfair to require private practitioners to help fulftime defenders bear the heavy work load imposed by the number of cases involving indigent criminal defendants without granting them full immunity. Your Honorable Court has held that state court judges are not liable for damages under 42 U.S.C.A. § 1983 (1970), otherwise known as the Civil Rights Act. *Pierson v. Ray*, 386 U.S. 547 (1967). This immunity was also extended to public prosecutors in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In addition, this Honorable Court has recently reviewed the doctrine of judicial immunity for participants in judicial proceedings and has indicated that such immunity is properly justified by sound reasons of public policy. *Butz v. Economou*, 98 S.Ct. 2894 (1978). Admittedly this Court in *Butz* held that some federal executive officials are entitled only to qualified immunity, but was quick to point out that as to those federal officers working within the judicial system, "[a]bsolute immunity is . . . necessary to assure that judges, advocates, and

witnesses can perform their respective functions without harassment or intimidation." 98 S.Ct. at 2914.

The Petitioner attempts to distinguish his case from the cited cases on the grounds that the alleged file material was not lost until one year after legal representation ceased, and that the respondent was acting in an administrative capacity. Both contentions are without a basis in fact. At all times the Respondent was attempting to fulfill his duty to the petitioner as an attorney appointed under the Criminal Justice Act.

Finally, it is important to note that the availability of absolute immunity from tort liability to court-appointed defense attorneys in no way limits the ability of society to remedy the inequities that might arise from the court-appointed attorneys' improper handling of a legal defense. In a criminal case, the criminal defendant is not left without an adequate legal remedy should errors of defense counsel be established. For instance, if the errors of defense counsel amount to ineffectiveness of counsel, the criminal defendant will be awarded a new trial. Furthermore, invaded federal rights may be asserted by direct appeal via state post-conviction remedies, and by federal *habeas corpus* petitions. Similarly, as *Imbler* pointed out, immunity from civil suit will not work to hamper the public in admonishing judicial misconduct. The recalcitrant court-appointed attorney is still subject to disciplinary procedures by the Bar Association and to criminal process for actions amounting to crimes as defined by the criminal statutes.

### Conclusion

Inasmuch as the law and public policy dictate that court appointed counsel for indigent criminal defendants have judicial immunity, the Respondent asserts that Petitioner's Petition For Writ of Certiorari has raised no special or important legal issues for resolution by this court and should be denied.

Respectfully submitted,

HERMAN C. KIMPEL,  
*Attorney for Respondent.*

Dickie, McCamey & Chilcote,  
3180 U. S. Steel Building,  
Pittsburgh, PA 15219,  
(412) 281-7272.

*Ed* *Cm*  
MAR 13 PAGE 8

IN THE  
SUPREME COURT OF THE UNITED STATES

NO. 78-6153

FRANCIS RICK FERRI

Petitioner

- VS -

DOMINICK ROSETTI, ESQUIRE

Respondant

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA  
FOR THE COMMONWEALTH OF PENNSYLVANIA

REPLY BRIEF OF THE PETITIONER

By,

Francis Rick Ferri  
P.O. Box 1000  
Lewisburg, Pa. 17837  
Petitioner Pro se

10

IN THE  
SUPREME COURT OF THE UNITED STATES

FRANCIS RICK FERRI, :  
Petitioner :  
- vs - :  
Docket Number 78-6153 :  
DONINICK ROSSETTI, ESQUIRE, :  
Respondant :

PETITIONER'S REPLY BRIEF

Pursuant to Rule 24(4), Rules Of The Supreme Court Of The United States, the petitioner respectfully files this Reply Brief to perfect the record and to correct the misrepresentations cited by the respondent in his brief in opposition.

BACKGROUND

On or about February 1, 1979, the petitioner filed with this Court, at docket number 78-6153, a petition for writ of certiorari accurately reflecting the history in this matter presenting the following question for review:

"WHETHER A LAWYER APPOINTED TO REPRESENT THE PETITIONER, UNDER THE CRIMINAL JUSTICE ACT, 18 U.S.C. § 3006A, IN A GRAND JURY INVESTIGATION IS IMMUNE FROM TORT LIABILITY AT THE SUIT OF HIS FORMER CLIENT FOR THE ADMITTED LOSS OF THAT CLIENT'S FILES ONE YEAR AFTER THE ATTORNEY-CLIENT RELATIONSHIP HAD BEEN TERMINATED ?"

In the interim this Court granted certiorari in the sister case, Francis Rick Ferri v Daniel Ackerman, Esquire, Docket No. 78-5981, on February 20, 1979, to review the decision of the Pennsylvania Supreme Court in Ferri v Ackerman, 394 A. 2d 553 (1978).

Petitioner had previously moved the Court to consolidate the petitions for writ of certiorari, since both petitions are directed at the identical threshhold issue, i.e. the boundries of absolute and qualified immunity afforded assigned defense counsel in a criminal prosecution from the suit of his former client.

CORRECTIONS

The respondent's brief contends that the loss of petitioner's file "had nothing to do with the charges for which the petitioner was ultimately convicted" (Resp. Br. page 1). Attached please find appendix pages 10 thru 18, which are excerpts from the criminal trial in United States Of America v Francis Rick Ferri, Cr. No. 74-277, U.S.D.C. for Western, Pa. attorney Dominick Rossetti testifying, the respondent herein.

Petitioner would call to this Court's attention appendix pages 12, 13, 14 and 17, where Mr. Rossetti admits that "the case on which you were representing him, was that the same case, the same charge that he is facing today, that is the indictment arising out of the bombing of Mr. Dunn's automobile in 1971?" (A.p. 12). "That was one of the matters....." (A.p. 13).

Additionally, the respondent's brief contends that a file of the petitioner's "which the respondent supposedly lost" (Resp. Br. page 2). If the Court would please note at appendix pages 17 and 18, where Mr. Rossetti admits that he has "not been able to locate any memorandum (A.p. 17).....Not being able to locate this memorandum....." (A.p. 18).

The attached appendix should quash any doubt that the respondent lost the petitioner's property, i.e. the file, which pertained to the charges he was then facing.

No contention is made in this Court, nor was same raised in the appellate courts below, that the petitioner was granted immunity. The sole issue presented to this Court was the question of liability upon the respondent for the loss of the petitioner's property.

<sup>1/</sup> After the completion of respondent's testimony the trial court ruled on the evidence presented that immunity had not been granted. Thus the significance of value placed upon the lost files, which should this matter be resolved in favor of the petitioner would be a question for a jury to decide.

#### CONCLUSION

Wherefore your humble petitioner respectfully prays this most Honorable Of Courts grant him the following relief:

- a) grant his petition for writ of certiorari and to consolidate this grant of certiorari with the sister case, Ferri v Ackerman, Docket Number 78-5981, or,
- b) to remand this case back to the Supreme Court Of Pennsylvania for further considerations as the Court may recommend.

Respectfully submitted,

  
Francis Kick Ferri  
P.O. Box 1000  
Lewisburg, Pa. 17837

Petitioner Pro se